

89-1329

Supreme Court, U.S.

FILED

FEB 14 1990

JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

IN THE
Supreme Court Of The United States

ROBERT ALLEN WILLIAMS,
Petitioner,

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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3217d



QUESTION PRESENTED FOR REVIEW

Whether a state court, in an action under the Federal Employers' Liability Act, can ignore *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, (1963), and other F.E.L.A.-decisions of this Court, and shift the responsibility for the safety of the workplace from the railroad to the injured employee.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Plaintiff-Petitioner, Robert Allen Williams, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, certifies that the following listed parties have an interest in the outcome of this case:

1. Illinois Central Railroad Company.
2. IC Industries, Incorporated.
3. Robert Allen Williams.

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ROBERT ALLEN WILLIAMS,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Allen Williams, respectfully requests that this Court grant his petition for writ of certiorari seeking review of the judgment of the Supreme Court of Alabama dated November 17, 1989.

OPINIONS BELOW

The Opinions of the Alabama Court of Civil Appeals and the Supreme Court of Alabama have not been released for publication in the official reporter; however, the Opinions are reproduced at pages A-1 through A-14 of the Appendix hereto. No Opinion was issued by the trial court, The Circuit Court of Jefferson County, Alabama.

JURISDICTION

The majority judgment of the Supreme Court of Alabama, without Opinion, was rendered on November 17, 1989. A dissenting Opinion was rendered the same date. The majority and dissenting Opinions of the Alabama Court of Civil Appeals were rendered on March 29, 1989, and on May 3, 1989, plaintiff's application for rehearing was denied without Opinion by that court.

This action was brought pursuant to the provisions of 45 U.S.C. Section 51 et seq. as a Federal Employers' Liability Act case. This Court has jurisdiction to review this case on petition for writ of certiorari pursuant to the provisions of 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

SECTION 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by

reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter

SECTION 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SECTION 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not

be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF THE CASE

This case was commenced on June 13, 1986, against the Illinois Central Gulf Railroad Company ("ICG") by petitioner, Robert Allen Williams.

Mr. Williams was an employee of ICG and was injured while throwing a switch which had been vandalized with a large amount of grease (there was a public grade crossing nearby where trains delayed vehicular traffic). He sustained injuries requiring two surgeries, six months lost railroad wages, and some permanent impairment of earning capacity. In argument ICG's counsel urged \$35,000.00 to \$36,000.00 as being reasonable damages.

Mr. Williams sued ICG under the provisions of the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq. The jury returned a verdict against ICG for \$1.00. The trial court overruled Mr. Williams' motion for new trial based on inadequacy of the verdict. Two members of the Alabama Court of Civil Appeals affirmed, one member dissenting, and on certiorari six members of the Alabama Supreme Court affirmed without opinion, three members dissenting with an opinion.

On December 4, 1985, it became Mr. Williams' duty to throw a railroad switch which is a heavy implement designed to move railroad rails from one position to another in order to facilitate a change of direction by railroad rolling stock. The particular switch involved was a switch known by Mr. Williams and the other members of his crew, as well as others, to be extremely hard to throw. Because of this difficulty Mr. Williams postured himself in a protective and braced position with his foot against the outside

of the switch tie at a place that was worn and darkened by his and other switchmen taking the same protective measure. There was a lot of non-railroad type grease on the switch handle. It was nighttime, it was cold, he had on gloves, and he had never encountered grease on the handle of a railroad switch before. He looked at it as he lifted it and did not see any grease nor did he make any particular examination of the handle for grease. He picked it up and started pulling the switch toward him in his braced position. Because of the grease on the switch handle and the physical difficulty offered by the switch, his hands slipped off the switch handle when he got to the hardest part of his pull, he fell backwards, hit on his back, and was injured. He subsequently had surgery for an aggravation of a previously existing pilonidal cyst and surgery for a ruptured lumbar intervertebral disc caused by his fall. He was unable to work for six months.

45 U.S.C. Section 53, makes the F.E.L.A. a comparative negligence statute, purely comparative.

The railroad took the position that Mr. Williams was guilty of contributory negligence because he did not inspect the switch handle for grease prior to using it. The railroad had a precautionary rule that employees inspect appliances before using them.

On the issue of contributory negligence, the plaintiff took a position consistent with that of Mr. Williams' boss, his conductor, who testified that he would never expect Mr. Williams to inspect the handles of the switches before throwing them at night. In addition there was no contributory negligence because there was no foreseeability of injury by Mr. Williams. By its verdict the jury sustained the plaintiff's position on the railroad's negligence in failing to provide a reasonably safe switch for Mr. Williams' use.

On appeal, the Alabama Court of Civil Appeals referred to a railroad rule requiring employees to inspect tools and appliances before using them. That court should have applied *Shenker* and rejected this evidence. It should have stated the rule of law of *Shenker*, that the railroad had the duty of inspecting the switch before sending Mr. Williams to throw it. Instead, the Court of Civil Appeals enhanced the railroad's rule, relieved the railroad of its duties under *Shenker*, and placed those duties on Mr.

Williams. Having placed these duties upon Mr. Williams, the court then held him guilty of contributory negligence for violating the rule. The railroad's rule as it was enhanced and applied to Mr. Williams by the Alabama Court of Appeals was as follows:

[I]t is the responsibility of the men working to inspect the equipment and tools that they work with to *be sure* that they are *safe to use*.
(Emphasis supplied)

Op. of Court of Civil Appeals, A-2.

Applying this contributory negligence to Mr. Williams, the majority opinion of the Alabama Court of Civil Appeals held \$1.00 to be adequate damages in the case after disregarding *Shenker* and the railroad's duty to Mr. Williams and making Mr. Williams an insurer of the safety of the switch.

On March 29, 1989, the Court of Civil Appeals of Alabama issued its majority written decision and its dissenting opinion in the case. (A-2)

On April 12, 1989, the plaintiff filed his application for rehearing and argument.

On May 3, 1989, the Court of Civil Appeals denied plaintiff's application without written opinion.

On May 17, 1989, the plaintiff filed a petition for writ of certiorari to the Alabama Court of Civil Appeals in the Alabama Supreme Court. The Alabama Supreme Court granted the writ and subsequently on November 17, 1989, ruled that the writ had been improvidently granted thereby affirming the Alabama Court of Civil Appeals. There was no written opinion by the majority of the Alabama Supreme Court but three members of the court dissented and issued a written opinion which is attached. (A-5)

Accordingly, Mr. Williams now files this petition for writ of certiorari.

REASON FOR GRANTING THE WRIT

The United States Supreme Court has repeatedly held that the railroad company owes to its employees

the non-delegable duty of using reasonable care to supply them with a safe place to work and safe and suitable tools and appliances with which to work. This duty includes inspections by the carrier *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 11 (1963). It has never held that the employee is surety for the safety of his own workplace. Even the railroad has never been held to be an insurer of the safety of the employees' workplace. Yet, the opinion in the case at bar upholds a \$1.00 verdict as being adequate on the basis of contributory negligence of Mr. Williams bottomed on the reasoning that a railroad rule made Mr. Williams the responsible party to inspect the railroad's tools and appliances to *be sure* that they were *safe to use*.

The Alabama courts' placing the duty to be sure that the appliance is safe to use upon Mr. Williams shifts the duty of supplying reasonably safe and suitable appliances from the railroad company to Mr. Williams. In *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, 11 (1963), this court quoted with approval *Texas & Pacific Railroad Co. v. Archibald*, 170 U.S. 665, as follows:

...the duty of the company to use reasonable diligence to furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition.

Id. at 670.

Shenker held that a B&O employee could recover even though he was injured by a faulty door on a P&LE car that had "just pulled into the station." *Shenker* held:

We hold that the B&O had a *duty to inspect* P&LE cars before permitting its employees to work with them.
(Emphasis supplied)

The Alabama Appellate Courts in the case at bar refused to follow *Shenker*, but instead referred to trial court evidence of a railroad rule, enhanced it and stated:

[I]t is the responsibility of the men working to inspect the equipment and tools that they work with to *be sure that they are safe to use.*

The railroad argued in *Shenker* that it had not had an opportunity to inspect the foreign car which had just pulled into the station and that argument was summarily rebuffed by this court with the words:

We hold that the B&O had a *duty to inspect* P&LE cars before permitting its employees to work with them.
(Emphasis supplied)

The car of *Shenker* and the switch in the case at bar are analogous. Both are protected by 45 U.S.C. Section 51 ("any defect or insufficiency, due to its negligence, in its cars ... appliances ..."). The Alabama Courts' stating that it was Mr. Williams' duty to "be sure that [the appliances] are safe to use " (A-2) goes even further than shifting the duty from the employer to the employee, it makes the employee a surety or guarantor of the safety of the appliances supplied for his work by the railroad company.

That the duty to inspect is on the railroad and not the employee was highlighted in a Federal Employers' Liability Act case of the Supreme Court of Alabama, *Seaboard Railroad v. Gillis*, 294 Ala. 726, 321 So. 2d 202 (1975). The analogy between the vehicle in *Gillis* and the switch in the case at bar is clear. Both are grounded on 45 U.S.C. Section 51. It was stated in *Gillis*:

The railroad's position as sole owner and ultimate controller of the vehicles assigned to Gillis placed upon it a duty to maintain those vehicles in safe working order for the protection of Gillis.

As to the question whether the railroad exercised reasonable diligence to discharge its duty and avoid foreseeable injuries, evidence of the railroad's procedure for inspection, repair and maintenance of its vehicles is relevant. It is uncontested that the railroad did not conduct a trouble-shooting system of inspection on its vehicles. The motor car involved in the accident had been used by Gillis for three years and during that time no efforts were made to avert mechanical difficulties until specific problems arose. Instead of holding regular inspections, the railroad instituted *a company policy that placed a duty on Gillis* and other motor car operators to report mechanic trouble when it arose by calling the maintenance supervisor. (Emphasis supplied)

* * *

If the railroad had actually conducted a regular inspection procedure, these arguments would go far toward discharging its duty of care. But, in retrospect, to say that if we had inspected, perhaps we would have found nothing, avails the railroad little. *As to the railroad's duty to inspect*, see *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963). (Emphasis supplied)

Id. at 730, 731.

The employee in *Gillis* was given a credit card by the railroad company and had a "maintenance supervisor for the motor car" assigned to him. Nevertheless, *Shenker* applied. Nowhere in *Gillis* is there any inference from the Supreme Court of Alabama that the employee was the one obligated to make the inspections called for by *Shenker*. Certainly if there were exceptions to *Shenker* then *Gillis* would be an exception due to the fact that the truck and motor car were entrusted to Gillis on a full-time basis. But no exception was made in *Gillis*. No exception should be made in the case at bar either. The blanket rule of *Shenker* is that railroads

shall inspect equipment before assigning employees to work with such equipment. That duty cannot be reversed. The onus cannot be shifted from the railroad company to the employee as was done by the appellate courts of Alabama in the case at bar — all to the end of creating contributory negligence on the part of Mr. Williams because he did not make “sure” that the switch was “safe to use.”

Since *Gillis*, quoting *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), points out that foreseeability is an ingredient in negligence in F.E.L.A. cases, it is pointed out to this court that Mr. Williams had never in his many years of work as a railroad switchman found a switch handle covered with non-railroad type grease prior to discovering this grease after he had fallen.

CONCLUSION

The jury found the ICG to be guilty of negligence, hence the verdict. The amount of damages of \$1.00 was so obviously inadequate that it should be set aside as a matter of law. The vehicle used by the appellate courts of Alabama to uphold the \$1.00 verdict in a Federal Employers' Liability Act case was to shift the burden of seeing that appliances are reasonably safe for the use of railroad employees from the railroad company to the employee. That is not proper and the United States Supreme Court should intervene and declare the impropriety of the Alabama appellate courts' deviation from both *Shenker* and rather basic Horn Book type F.E.L.A. law.

Respectfully submitted,

By: Frank O. Burge, Jr.
FRANK O. BURGE, JR.

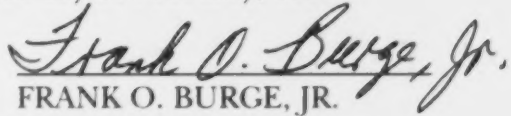
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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served: Michael C. Quillen, Esq. and Samuel M. Hill, Esq., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Post Office Box 830612, Birmingham, Alabama 35283-0612, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 14th day of February, 1990.


FRANK O. BURGE, JR.
Counsel for Plaintiff

APPENDIX

XIC 99A

A-1

APPENDIX

STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1988-89

Civ. 6701

Robert Allen Williams

v.

Illinois Central Gulf Railroad Company,
a corporation

Appeal from Jefferson Circuit Court

HOLMES, Presiding Judge

This is a Federal Employers' Liability Act (FELA) case. 45 U.S.C. §§ 51-60 (1982).

Williams sued his employer, Illinois Central Gulf Railroad Company (ICG), asserting negligence on the part of ICG which resulted in injuries to Williams. ICG denied liability and alternatively asserted Williams's contributory negligence as a defense to its liability. The jury returned a general verdict in favor of Williams in the amount of one dollar (\$1). Williams filed a motion for a new trial based on inadequacy of damages, which was denied. Williams, through able and distinguished counsel, appeals, and we affirm.

The dispositive issue on appeal is whether the trial court abused its discretion in denying Williams's motion for a new trial.

The pertinent facts as revealed by the record are as follows: Williams was employed as a head brakeman with ICG at the time

of his injury. At approximately 10 P.M. on December 4, 1985, Williams was attempting to "throw" a track switch (a heavy steel device used to allow trains to move from one track to another). After Williams had unlocked the track switch, he grabbed the handle of the switch and attempted to turn or "throw" the switch. When he pulled on the handle, Williams's hands slipped off and he fell backwards. After he fell, Williams noticed grease covering his gloves and the switch handle.

Williams completed his work for the night and prepared an accident report. On the report the cause of the accident was listed as "handle on switch was heavily greased." Further, the report stated that the equipment was defective "because of excessive grease on handle of switch." The record also indicates that the handle was hard to turn.

The record further reveals testimony that the grease on the handle was not the type the railroad used to lubricate switches and that the switch appeared to have been vandalized. Additionally, there was testimony that it is the responsibility of the men working to inspect the equipment and tools that they work with to be sure that they are safe to use.

We are governed in this case by the decisions of the federal courts. See cases cited in *Kite v. Louisville & Nashville Railroad Co.*, 508 So. 2d 1172 (Ala. Civ. App. 1986).

Additionally, we are to presume that the jury verdict here is correct, and we will not set it aside unless the verdict is the result of passion, prejudice, or improper motive. *Brown v. Seaboard Coast Line Railroad Co.*, 473 So. 2d 1022 (Ala. 1985).

The only issue we must address in this instance pertains to the amount of the award. However, the question is not whether we think the award was low, but whether the trial court abused its discretion in denying Williams's motion for a new trial. *Porterfield v. Burlington Northern, Inc.*, 534 F. 2d 142 (9th Cir. 1976). Williams has a substantial burden to demonstrate that the trial court's discretion was abused. *Porterfield*, 534 F. 2d 142.

After a careful review of the record, we conclude that Williams has not met this burden.

First, we note that damages frequently depend upon whether the jury believes the plaintiff (here Williams). Juries are not required to believe every expression of opinion by an expert or

any other witness. *Hail v. Texas & New Orleans Railroad Co.*, 307 F. 2d 875 (5th Cir. 1962). The jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *Dennis v. Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208 (1963). Further, we point out that the ultimate damages depend on the degree of negligence Williams may have contributed to the whole accident as compared with that of ICG.

Title 45 U.S.C. § 53, in part, provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Here, both the negligence of ICG and the contributory negligence of Williams were hotly contested at trial. ICG's contributory negligence defense was based on Williams's failure to discover grease on the handle of the switch before he attempted to throw it. ICG introduced evidence that Williams had a duty imposed by railroad rules to examine the switch before he attempted to throw it. Further, Williams made no contention that he had an inadequate opportunity to inspect the switch handle.

Because the verdict here is a general one, we do not know what percentage of the negligence causing the accident the jury allotted to Williams. Certainly, it would appear that the jury found Williams's negligence substantial, and such is supported by the evidence. It is well within the province of the jury to conclude that Williams fell simply because his hands slipped and that Williams was guilty of contributory negligence in his failure to examine the switch handle. In other words, the jury could have concluded from the evidence that, although ICG was negligent, Williams failed to inspect the equipment before he used it and was, therefore, also negligent. We also note that the evidence before the jury could have supported a finding of no negligence on ICG's part. Therefore, the jury's conclusion of substantial negligence on Williams's part is certainly not error.

In view of the above, we cannot say that the trial court abused its discretion in denying Williams's motion for a new trial. This is especially true in light of the presumption of correctness accorded a jury verdict.

This case is due to be affirmed.

AFFIRMED.

Ingram, J., concurs.

Robertson, J., dissents.

ROBERTSON, Judge (dissenting)

I respectfully dissent.

Had the jury's award been excessive, the trial court could have granted a new trial or ordered a remittitur. Undisputed damages in this case were shown to be in excess of \$30,000. However, defendant's counsel argued that the verdict should be less because of comparative contributory negligence on the part of the defendant.

The verdict for \$1.00 was so inadequate as to affirmatively indicate that it resulted from mistake or some other improper motive.

A substantial additur should have been made by the court, or the plaintiff should have been granted a new trial based upon the inadequacy of damage due to a mistaken interpretation of joint tort-feasor liability or comparative contributory negligence.

Therefore, I respectfully dissent.

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1989-90

Ex parte Robert Allen Williams

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

88-1071

(Re: Robert Allen Williams

v.

Illinois Central Gulf Railroad Company, a corp.)

(Jefferson Circuit Court, CV-86-3470)

PER CURIAM.

WRIT QUASHED AS IMPROVIDENTLY GRANTED.

Maddox, Almon, Shores, Houston, Steagall, and Kennedy, JJ.,
concur.

Hornsby, C. J., and Jones and Adams, JJ., dissent.

JONES, JUSTICE (dissenting).

This case is before the Court upon a petition for writ of certiorari. I would reverse the judgment of the Court of Civil Appeals. Petitioner Robert Allen Williams filed suit against the respondent Illinois Central Gulf Railroad Company ("ICG") based on negligence under the Federal Employers Liability Act, 45 U.S.C. § 51 et seq. (FELA). The railroad denied liability and claimed that Williams was contributorily negligent. The case was submitted to a jury, and the jury returned a general verdict in favor of Williams in the amount of \$1. The trial court entered judgment upon the verdict. Thereafter, Williams filed a motion for new trial based on a claim of inadequate damages. The trial court denied the motion, and on appeal to the Court of Civil Appeals affirmed the judgment.

The Court of Civil Appeals concisely set forth the operative facts:

"Williams was employed as a head brakeman with ICG at the time of his injury. At approximately 10 P.M. on December 4, 1985, Williams was attempting to 'throw' a track switch (a heavy steel device used to allow trains to move from one track to another). After Williams had unlocked the track switch, he grabbed the handle of the switch and attempted to turn or 'throw' the switch. When he pulled on the handle, Williams's hands slipped off and he fell backwards. After he fell, Williams noticed grease covering his gloves and the switch handle.

"Williams completed his work for the night and prepared an accident report. On the report the cause of the accident was listed as 'handle on switch was heavily greased.' Further, the report stated that the equipment was defective 'because of excessive grease on handle of switch.' The record also indicates that the handle was hard to turn.

"The record further reveals testimony that the grease on the handle was not the type that the railroad used to lubricate switches and that the switch appeared to have been vandalized."

Williams's evidence revealed the resulting injuries, including a ruptured intervertebral lumbar disc and an aggravation of a pre-existing pilonidal cyst. Undisputed special damages were shown to be in excess of \$30,000.

It is the uniform jurisprudence in this state that a jury's verdict, where supported by the evidence, is presumed to be accurate, and should not be disturbed on the grounds of inadequate damages, unless the amount is so inadequate as to clearly show that the verdict was the result of mistake or of prejudice, passion, or some other improper motive. This presumption is strengthened when the trial court refuses to grant a motion for a new

trial. In reviewing the trial court's decision to grant or to deny a motion for new trial on the grounds of inadequate damages, however, we must ascertain whether the verdict is consistent with the preponderance of the evidence. *Carter v. Reid*, 540 So. 2d 57 (Ala. 1989).

At the outset, it should be mentioned that the FELA supplants state laws with a uniform system of remedial rules, which govern railroad workers' claims against their employers. Specifically, it provides railroad employees an exclusive remedy against their employers for injuries resulting from their employers' negligence. *In re Second Employer's Liability Cases* 223 U.S. 1, 32 (1912). The courts have liberally construed the FELA so as to facilitate its objectives. *Urie v. Thompson*, 337 U.S. 163 (1949). See, also, Richter and Foer, *Federal Employers' Liability Act — A Real Compensatory Law for Railroad Workers*, 36 Cornell L.Q. 203 (1951). In order to ensure uniformity, federal law must take precedence over state law. "This is a necessary conclusion if uniformity is to be achieved, considering the fact that state and federal courts have concurrent jurisdiction to entertain FELA suits. 45 U.S.C. § 56." *Ex parte Burlington Northern R.R. Co.*, 470 So. 2d 1094, 1096 (Ala. 1985). See, also, Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §§ 3526, 3527 (1984).

From its inception in 1908, the FELA has embraced a comparative negligence standard. The FELA provides, however, that, although contributory negligence "shall not bar a recovery," it may be used to diminish damages in "proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53 (1982).

The question whether a jury instruction on contributory negligence is proper depends on the facts of each individual case. "A defendant is entitled to such an instruction to the jury if there is any evidence to support that theory." *Meyers v. Union Pacific R.R. Co.*, 738 F. 2d 328, 331 (8th Cir. 1984). Correspondingly, in an FELA case, the burden of proving contributory negligence rests squarely on the railroad.

"[If] no evidence is presented from which a jury could properly find a lack of due care by a plaintiff, then it is generally fundamental error for the [trial] court to

give a contributory negligence instruction, and a plaintiff is entitled to a new trial."

Wilson v. Burlington Northern, Inc., 670 F. 2d 780, 782 (8th Cir. 1982), *cert. denied*, 457 U.S. 1120 (1982).

As stated in the Court of Civil Appeals' opinion:

"ICG's contributory negligence defense was based on Williams's failure to discover grease on the handle of the switch before he attempted to throw it. ICG introduced evidence that Williams had a duty imposed by railroad rules to examine the switch before he attempted to throw it."

The question whether the alleged rule violation was admissible to show contributory negligence turns on the corresponding question whether the rule was general or specific in its terms. *Atchison, T. & S.F. Ry. v. Ballard*, 108 F. 2d 768 (5th Cir. 1940), *cert. denied*, 310 U.S. 646 (1940). Unfortunately, the rule in question is not included in the record. It should be pointed out, however, that, if the rule was merely a perfunctory reminder of caution, it should not have been submitted to the jury for the purpose of proving contributory negligence. Nevertheless, it is not on this point that I disagree with the judgment of affirmance by the Court of Civil Appeals. I agree that the contributory negligence issue was properly submitted to the jury and that the jury was properly instructed on the comparative negligence doctrine and its concomitant "reduction of damages" principle.

ICG contends that there was substantial evidence from which the jury could have found that Williams's negligence was the proximate cause of his injuries in a greater proportion than was ICG's alleged negligence. Even if we accept this conclusion, the validity of the jury verdict in favor of the plaintiff and an award of \$1 is still a viable issue. It is on this point that I differ with the Court of Civil Appeals' holding that, under the facts of this case, the verdict for the plaintiff and an award of \$1 is not an inconsistent verdict as a matter of law.

The evidence tends to show that vandalization of switch handles and other railroad equipment was not encountered by

the railroad employees on a regular basis. Williams testified that he had *never* encountered grease on a switch handle in his 20-plus years as a railroad employee. It should also be mentioned that, with the exception of the "inspection" issue, Williams's method of throwing the switch was not contested.

Aubrey Pollen, who had been a railroad conductor since 1960 and who was Williams's supervisor, testified:

"Q Would you expect [Williams] that evening to go out and inspect that handle to see if it had grease on it?

"A No, sir."

On recross-examination, Mr. Pollen was asked:

"Q Mr. Pollen, are you saying you don't expect the men that work under you to inspect equipment or just look at it before they use it, even though that's in the safety rules, the operating rules, as you said, common sense?

"A Well, certainly everybody would look at something before they attempted to do it. But as far as it depends on the situation. I mean, if — you don't go out and inspect every switch before you throw it if you got X amount of switches to throw, or so forth and so on. If you encounter the danger, then is when you do something about it."

Williams testified as follows:

"Q At this point where was the engine, where was the locomotive engine?

"....

"A 15 or 20 [feet back].

"Q And what about his headlight, did he have it on dim or bright?

"A Had it on bright.

"Q What part, if any, did that play in your ability to [see] what you were doing, sir?

"A When I was unlocking the switch?

"Q Yes, sir.

"A The headlight was blinding me.

"Q It was coming from your right side?

"A Yes, sir.

"Q Did you ever see any grease on this [handle]?

"A I did not."

Boyd Sims, a section foreman who had the responsibility of maintaining the track and switches in the area of the accident, testified that the switch operated normally on the morning after Williams's accident. Sims, a railroad employee with over 24 years' experience, further testified on direct examination:

"Q Did you get a report of Mr. Williams being injured out at that switch?

"A The next morning, yes, sir.

". . . .

"Q How did you get a report of that?

"A Mr. Reese called me and told me that somebody put too much grease on the switch or too much oil on the switch at Woodstock, to check it.

"Q But did you find oil on it?

"A I found grease on it, not oil but grease.

"Q Was it any kind of grease like you or someone else in the maintenance of way department would use on a switch?

"A No.

"Q Had you ever seen grease like that out on a switch?

"A Never in my career, never on a switch stand.

"Q What did you do when you got to the switch?

"A We took rags, or paper towels really, and wiped the grease off and took gasoline and washed the switch stand down where there was no more evidence of grease on the switch stand.

"Q Did you see anything around the switch that would indicate to you how that grease got there?

"A We found an empty cartridge or tube, a paper tube about that long and that big around that you buy a cartridge of grease in. We found one of those and a newspaper with grease on it."

It is axiomatic that an employer, in an FELA action, has the duty to exercise reasonable care in the workplace (*Kurn v. Stanfield*, 1211 F.2d 469 (8th Cir. 1940)), and that this reasonable care standard translates into a duty of the railroad to provide its employees with a reasonably safe place to work.

"That rule is deeply engrained in federal jurisprudence. *Patton v. Texas & Pacific Ry. Co.*, 179 U.S. 658, 664, and cases cited; *Kreigh v. Westinghouse & Co.*, 214

U.S. 249, 256, 257: *Kenmont Coal Co. v. Patton*, 268 F. 334, 336. As stated by this Court in the *Patton* case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care — reasonableness depending upon the danger attending the place or the machinery.' 179 U.S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co. v. Deal* 231 F. 604; *Northwestern Pacific R. Co. v. Fiedler*, 52 F. 2d 400; *Thomson v. Boles*, 123 F. 2d 487; 2 Roberts, *Federal Liabilities of Carriers* (2d ed.) § 807. That duty of the carrier is a 'continuing one' (*Kreigh v. Westinghouse & Co.*, *supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

Bailey v. Central Vermont Ry., 319 U.S. 350, 353 (1943).

This interminable duty under the FELA to provide a safe place to work, while measured by foreseeability standards, is more expansive than the general duty to use reasonable care. *Ragsdell v. Southern Pacific Transp. Co.*, 688 F. 2d 1281 (9th Cir. 1982).

Moreover, the foregoing authorities must be read in conjunction with 45 U.S.C. § 52, part of the Act itself. Section 52 provides in relevant part:

"Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Although I agree with the railroad that the trial court did not err in submitting the contributory negligence issue to the jury, I do not agree that the "reduction of the damages" principle that

applies under the comparative negligence doctrine is consistent with the award of damages of \$1. One does not need the skill of a mathematician to know that \$1 is so small a percentage of \$30,000 (.0033%) as to render the jury's finding of the comparative degrees of fault between these parties totally ridiculous.

Admittedly, it is a rare case when this Court should disturb a jury's verdict. However, in my opinion, this is one of those rare cases, because the verdict is clearly inconsistent with the preponderance of the evidence. Given the jury's finding of liability on the part of the employer and contributory negligence on the part of the plaintiff, all of the credible evidence points toward an award substantially greater than the \$1 amount awarded. Indeed, the record reveals that, during summation to the jury, counsel for the railroad appropriately argued that the evidence of contributory negligence supported a diminution of the damages; and, accordingly, he suggested that, even if the jury found in favor of the plaintiff, its verdict for as little as \$7,500 would be justified in light of the plaintiff's contributory negligence. My point is that not even counsel for the railroad dared to indulge in an argument so ridiculous as to suggest that the jury return a verdict for \$1 in the event the jury should find for the plaintiff on the issue of liability.

Although I agree that the jury was justified in finding that Williams was guilty of contributory negligence, by the same token, given the liability of the defendant as found by the jury, I cannot agree that the jury's verdict was consistent with the evidence presented. In short, "[a]fter allowing all presumptions in favor of its correctness, [I am] convinced that the evidence against the [award] is so decided as to clearly convince [me] that it is wrong and unjust." *Deal v. Johnson*, 362 So. 2d 214, 219 (Ala. 1978).

Moreover, this case and the cases of *Thompson v. Cooper*, [Ms. 87-1270, September 29, 1989] ___ So. 2d ___ (Ala. 1989); *Moore v. Clark*, [Ms. 88-605, May 12, 1989] ___ So. 2d ___ (Ala. 1989); and *Clements v. Lanley Heat Processing Equipment*, [Ms. 87-909, May 12, 1989] ___ So. 2d ___ (Ala. 1989), are not distinguishable. Our "inconsistent verdict" holdings in those three recent cases — although decided in the context of the contributory negligence

rule and involving verdicts for the plaintiffs and awards were \$0 — require a similar holding under the facts of this case.

I acknowledge, of course, that, under the comparative negligence doctrine, a jury verdict for the plaintiff in an amount substantially less than the proved special damages would not be an inconsistent verdict as a matter of law. But where, as here, the undisputed special damages alone total in excess of \$30,000 and the jury finds against the defendant on the issue of liability and awards the plaintiff \$1 in damages, it is inconceivable to the rational mind that the verdict represents a reasonable apportionment of the fault as between these parties. Thus, I would hold that under the facts of this case, the verdict was inconsistent and that the Court of Civil Appeals erred in not reversing for the trial court's failure to set aside the verdict and order a new trial.

Hornsby, C. J., and Adams, J., concur.



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CASE NO. 89-1329

FILED
MAR 13 1990
JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT ALLEN WILLIAMS,
Petitioner,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT

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21 pp

QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Alabama correctly affirmed the denial of a new trial motion which alleged inadequacy of the verdict in this Federal Employers' Liability Act case, where the applicable pure comparative negligence standard, coupled with evidence of the plaintiff's negligence, explains the verdict.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Respondent, Illinois Central Railroad Company, in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, effective January 1, 1990, certifies that the following parties have an interest in the outcome of this case.

1. The Honorable Arthur J. Hanes, Jr., Judge, the Circuit Court of Jefferson County, Alabama.
2. Illinois Central Railroad Company, Respondent.
3. Illinois Central Corporation.
4. Prospect Group Incorporated
5. Michael C. Quillen, attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, for Respondent, Illinois Central Railroad Company.
6. Samuel M. Hill, attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, for Respondent, Illinois Central Railroad Company.
7. Robert Allen Williams, Petitioner.
8. Frank O. Burge, attorney with the firm of Burge & Wettermark P.C., for Petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Ex Parte Williams*, 554 So. 2d 440 (Ala. 1989) and the opinion of the Alabama Court of Civil Appeals is reported as *Williams v. Illinois Central Gulf Railroad*, 554 So. 2d 437 (Ala. Civ. App. 1989). No opinion was issued by the trial court, Judge Arthur J. Hanes, Jr., for the Circuit Court of Jefferson County, Alabama.

JURISDICTION

The Petitioner seeks review of the decision of the Supreme Court of Alabama, issued on November 17, 1989, and reported at 554 So. 2d 440 (Ala. 1989). This action was filed pursuant to the Federal Employers' Liability Act, 45 U.S.C.

§ 51 *et seq.* This Court's jurisdiction to issue the writ is alleged to be pursuant to the terms of 28 U.S.C. § 1257. The Respondent maintains that this Court lacks jurisdiction because the issue made the subject of the petition is so insubstantial as to preclude this Court from taking jurisdiction.

STATUTES INVOLVED

45 U.S.C. § 51.

SECTION 51. Liability of common carriers by railroad, in interstate or foreign Commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce

and shall be considered as entitled to the benefits of this chapter.

★ ★ ★

45 U.S.C. § 53

SECTION 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF THE CASE

Judge Holmes' statement of the facts in his opinion for the Alabama Court of Civil Appeals succinctly sets out the relevant facts necessary for disposition of the petition for certiorari. The Illinois Central Railroad Company (hereinafter "Illinois Central") adopts that court's statement and reproduces it below for the convenience of this Court.¹

This is a Federal Employers' Liability Act (FELA) case. 45 U.S.C. §§ 51-60 (1982).

¹ The Illinois Central adds only a response to Williams' statement in his petition that: "In argument, ICG's counsel urged \$35,000.00 to \$36,000.00 as being reasonable damages" (Williams Petition at 4) by noting that counsel also urged no recovery.

Williams sued his employer, Illinois Central Gulf Railroad Company (ICG), asserting negligence on the part of ICG which resulted in injuries to Williams. ICG denied liability and alternatively asserted Williams's contributory negligence as a defense to its liability. The jury returned a general verdict in favor of Williams in the amount of one dollar (\$1). Williams filed a motion for a new trial based on inadequacy of damages, which was denied. Williams, through able and distinguished counsel, appeals, and we affirm.

The dispositive issue on appeal is whether the trial court abused its discretion in denying Williams's motion for a new trial.

The pertinent facts as revealed by the record are as follows: Williams was employed as a head brakeman with ICG at the time of his injury. At approximately 10 P.M. on December 4, 1985, Williams was attempting to "throw" a track switch (a heavy steel device used to allow trains to move from one track to another). After Williams had unlocked the track switch, he grabbed the handle of the switch and attempted to turn or "throw" the switch. When he pulled on the handle, Williams's hands slipped off and he fell backwards. After he fell, Williams noticed grease covering his gloves and the switch handle.

Williams completed his work for the night and prepared an accident report. On the report the cause of the accident was listed as "handle on switch was heavily greased." Further, the report stated that the equipment was defective "because of excessive grease on handle of switch." The record also indicates that the handle was hard to turn.

The record further reveals testimony that the grease on the handle was not the type the railroad used to lubricate switches and that the switch appeared to have been vandalized. Additionally, there was testimony that it is the responsibility of the men working

to inspect the equipment and tools that they work with to be sure that they are safe to use.

554 So. 2d at 438-39.

The Alabama Court of Civil Appeals received briefs and heard oral argument on the issue of the inadequacy of the verdict. On March 29, 1989, the court ruled that Judge Hanes, the trial court, had not abused his discretion in refusing to grant a new trial. On May 3, 1989, the Alabama Court of Civil Appeals denied Williams' motion for a rehearing.

On May 18, 1989, Williams filed a Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals with the Supreme Court of Alabama. After briefing, the Supreme Court of Alabama granted the petition on July 6, 1989. On November 17, 1989, that court quashed the writ as improvidently granted. Williams filed the present petition on February 14, 1990.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The issue Williams presented to the trial court and the Alabama appellate courts for post-trial review questioned the adequacy of the damages awarded by the jury. The Illinois Central contends that this is necessarily the issue which must be presented to this Court.

Petitioner Williams himself on motion for new trial and appeal framed the issue for review as the adequacy of damages until the Alabama Court of Civil Appeals decided the issue against him.² When the Alabama Court of Civil Appeals

² The petition for certiorari filed in this Court also betrays Williams' belief that the real issue concerns the adequacy of the damages awarded and the propriety of the denial of the motion for a new trial. In the "Statutory Provisions Involved" section of his petition, Williams sets forth the language of 45 U.S.C. § 53 (concerning the effect of contributory negligence) and 45 U.S.C. § 54 (concerning FELA assumption of risk doctrine). While these sections of the FELA are certainly relevant to an analysis of whether the damages awarded were adequate, they are not relevant to the question presented by Williams.

handed down its decision, Williams changed his approach and began to attack the analysis of that court. He now says that court placed the burden on him to provide himself a safe place to work—the “burden-shifting” issue. Williams now attempts to bring this issue, and this issue only, to this Court.

The burden of an employer subject to the FELA to provide a reasonably safe place for employees to work was not in issue at trial. Williams’ statement in his Petition that this is the question presented for review is an effort to foist a non-issue on the Court. Williams does not argue that the jury was wrongly instructed, nor can he so argue. This was not an issue presented to or decided by the Alabama Court of Civil Appeals.³ It was certainly not an issue addressed by the Supreme Court of Alabama which quashed Williams’ writ of certiorari.⁴

By contending that the “burden-shifting” issue is one that can be presented for review by this Court, Williams is asking the Court to indulge in a fiction which requires the willing suspension of disbelief. Williams asks this Court to believe that the Alabama Court of Civil Appeals addressed this issue which was not presented to it and to which it did not write. He asks this Court to believe that the Alabama Court of Civil Appeals misconstrued decades of FELA precedent and held an employee has the sole responsibility to provide himself with a safe workplace. Finally, Williams expects this Court to believe that the Supreme Court of Alabama blinked at this tremendous legal error.⁵ The mere statement of Williams’ argument reveals its implausibility.

³ The Alabama Court of Civil Appeals described the issue presented to it: “The only issue we must address in this instance pertains to the amount of the award. However, the question is not whether we think the award was low, but whether the trial court abused its discretion in denying William’s motion for a new trial.” 554 So. 2d at 439.

⁴ The majority decision of the Alabama Supreme Court was rendered without an opinion. 554 So. 2d at 440. The dissenting justices, speaking through Justice Jones, wrote a lengthy opinion addressing the amount of the damages awarded. 554 So. 2d at 441. No member of the court addressed the burden-shifting argument urged on them by Williams.

⁵ Because the Alabama Supreme Court quashed its writ of certiorari without an opinion, Williams’ attacks on the Alabama courts are limited to the opinion issued by the Alabama Court of Civil Appeals as affirmed by the action of the Alabama Supreme Court.

In response to Williams' petition for a writ of certiorari, the railroad argues that the Alabama courts have not by their holdings in this case improperly shifted the responsibility for the safety of the workplace from the Illinois Central to Williams. The railroad further maintains that Williams' fictional burden-shifting issue creates no federal question of which this Court can take jurisdiction.

II. THE ALABAMA COURTS HAVE NOT IMPROPERLY PLACED THE BURDEN OF PROVIDING A REASONABLY SAFE WORKPLACE ON THE PETITIONER.

In his petition for a writ of certiorari, Williams argues that the Alabama courts have wrongly placed the burden on him to provide himself a reasonably safe workplace. His sole basis for this argument is a sentence fragment from the Alabama Court of Civil Appeals opinion wherein the court was reviewing the evidence presented to the jury. The language relied upon, emphasized below, appears in the final paragraph devoted to reviewing the evidence:

The record further reveals testimony that the grease on the handle was not the type the railroad used to lubricate switches and that the switch appeared to have been vandalized. Additionally, there was testimony that *it is the responsibility of the men working to inspect the equipment and tools that they work with to be sure that they are safe to use.* (Emphasis added.)

554 So. 2d at 439. Even a cursory review of the opinion reveals that the court's purported misstatement of law was not a statement of law at all; it is a statement concerning evidence presented at trial. The Alabama Court of Civil Appeals had not begun its discussion of the law of the case and had not made any observation concerning the burden of providing a safe workplace to anyone and *a fortiori* did not place that burden on Williams.

The evidentiary basis for the court's observation ironically comes from the questioning of a witness called by

Williams. The following are questions to and answers from Aubrey Pollan, the plaintiff's immediate supervisor on the night of the incident:

Q. Mr. Pollan, it's the responsibility of you and the men working under you to inspect the equipment and tools they work with, isn't it?

A. Inspect the equipment and tools?

Q. That's right. Before they use equipment or tools, they're supposed to inspect it to be sure it's safe to use them, aren't they?

A. Safe working, in proper and safe working order; is that what you're saying?

Q. Yes, sir.

A. To the best of my knowledge, that's so.

Q. That's written in safety rules and operating rules, and it's just common sense, isn't it, Mr. Pollan?

A. Yes, sir."

(R.T. 176). This evidence was admitted without objection.

Trying so hard to make an issue after the fact, Williams argues belatedly in the Statement of the Case portion of his Petition that the Alabama Court of Civil Appeals erred in accepting this evidence. Williams writes:

On appeal, the Alabama Court of Civil Appeals referred to a railroad rule requiring employees to inspect tools and appliances before using them. The court should have applied *Shenker* and rejected this evidence. It should have stated the rule of *Shenker*, that the railroad had the duty of inspecting the switch before sending Mr. Williams to throw it. Instead the Court of Civil Appeals enhanced the railroad's rule, relieved the railroad of its duties under *Shenker*, and placed those duties on Mr. Williams.

(Williams Petition at 5-6.)

Williams wants this Court to reverse the Alabama court for acknowledging evidence from which contributory negli-

gence could be inferred. The argument was never presented below, and further, the railroad is entitled to present such evidence. That evidence can include the violation of railroad safety rules. This Court, federal courts of appeals and state appellate courts have ruled that violations of railroad safety rules are admissible to show the contributory negligence of the injured employee. See e.g., *Tennant v. Peoria & P.U.R.R. Co.*, 321 U.S. 29, 43 (1944); *Atchison T. & S.F. Ry. Co. v. Ballard*, 108 F.2d 768 (5th Cir.) cert. denied, 310 U.S. 646 (1940) ("A violation of specific rules though, will constitute negligence just as their observance by others, will, in relation to the violator, constitute due care."); *Nickell v. Baltimore & O.R. Co.*, 347 Ill. App. 202, 106 N.E.2d 738 (1952) and *Wilson v. Norfolk and Western Ry. Co.*, 109 Ill. App. 3d 79, 440 N.E.2d 238 (1982). The jury was entitled to consider any violation of the railroad safety rules in deciding questions of liability and damages in this FELA case. The Alabama Court of Civil Appeals' reference to that evidence, and its deference to the jury's consideration of that evidence, is proper.

The most disturbing aspect of Williams' editing of the Alabama Court of Civil Appeals' opinion to make an observation about testimony appear to be a statement of law is the manipulative and misleading nature of such a tactic. Williams begins his Petition by quoting the Alabama Court of Civil Appeals' opinion. He does not place the quote in any context, nor does he indicate that he is not quoting the full sentence used by that court. Indeed, he reproduces the quotation a second time (Williams Petition at 8), again without citation, and without ellipsis or any other indication that he is altering the context and the meaning of the court's opinion.

After repeating the abridged quotation in the "Reasons for Granting the Writ" section of his Petition, Williams writes that the Alabama Court of Civil Appeals "enhanced" the railroad rule and held that the employee must inspect his equipment and tools to "be sure that they are safe to use." (Williams petition at 8). This use of the quotation wholly mischaracterizes what the Alabama Court of Civil Appeals wrote. The part of the sentence omitted by Williams clearly

indicates that the Alabama Court of Civil Appeals was reviewing the evidence presented at trial. The sentence is not a ruling that the employee must provide himself a safe workplace. The sentence is not even dicta. It is a recitation of evidence offered. This patent mischaracterization of that court's opinion exceeds the bounds of zealous advocacy and subverts this Court's effort to reach a just result.

Williams asserts, by uttering the oft-quoted sentence fragment, that the Alabama courts have made "Mr. Williams an insurer of the safety of the switch" (Williams petition at 6); have shifted "the duty of supplying reasonably safe and suitable appliances from the railroad company to Mr. Williams" (Williams petition at 7); have contravened both *Texas & Pacific Railroad Co. v. Archibald*, 170 U.S. 665 (1898) and *Shenker v. B. & O. Railroad Co.*, 374 U.S. 1 (1963). (Williams petition at 7-8); and have contravened *Seaboard Railroad v. Gillis*, 294 Ala. 726, 321 So. 2d 202 (1975) (Williams petition at 8-9). Despite the Petitioner's allegations to the contrary, the Alabama courts have not contravened federal law, this Court's precedent, or Alabama precedent. The Alabama Court of Civil Appeals reviewed the evidence in a case in which a comparative negligence standard applies and determined that the evidence could have supported a jury finding of the railroad's negligence and the Petitioner's contributory negligence in any relative degree. Such an examination and analysis is consistent with, not contrary to, the Federal Employers' Liability Act and the cases cited by Williams.

The jury, not the Alabama Court of Civil Appeals, apportioned the relative degrees of negligence in this case. The jury was charged as to the duty on the railroad to exercise reasonable care to provide Williams a reasonably safe place to work and as to Williams' obligation to exercise reasonable care for his own safety. Those charges were given without objection from Petitioner's counsel. The charges read:

One of the duties of the defendant to the plaintiff is to provide a reasonably safe place to work. In doing so, the defendant must use reasonable care to

provide for the safety of its employees. Of course, the defendant is not a guarantor or insurer of the safety of the place to work. The extent of the defendant's duty is to exercise reasonable care under the circumstances, at the time and place in question, to provide the plaintiff with a reasonably safe place to work. (T. 573)

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When I speak of negligence on the part of the plaintiff, I mean it in the same general sense as I have previously described negligence to you. That is, in one sense, the failure to exercise reasonable care or that failure to perform a legal duty. It was the continuing duty of the plaintiff to exercise reasonable care under the circumstances for his own safety and protection. (T. 576)

This is the language upon which the jury was asked to decide the case. The Alabama Court of Civil Appeals simply said that Judge Hanes did not abuse his discretion in denying Williams' motion for a new trial.

Williams' fictional account of what has transpired below would be incomplete without a concluding plot twist. Accordingly, Williams adopts yet another approach and argues in the final paragraph of the argument portion of his Petition that a greased switch handle was not foreseeable. The foreseeability of grease on the switch handle was never an issue. What was an issue was the possibility that *something* could be wrong with the switch that an inspection or simple observation could have disclosed. However Mr. Williams may characterize the truth, the jury decided that Mr. Williams' negligence caused the great majority of his injuries. The jury was the fact finder and the ultimate arbiter of truth in this case.

III. THE CLAIM PRESSED IN THE PETITION IS SO INSUBSTANTIAL AS TO PRECLUDE THIS COURT FROM TAKING JURISDICTION.

In order for this Court to exercise jurisdiction over the judgments of state courts, there must be something more than a mere claim that a federal question exists. *Parker v. McLain*, 237 U.S. 469, 471 (1914); *Wabash Railroad v. Flannigan*, 192 U.S. 29, 38 (1903); *New Orleans Water Works Co. v. Louisiana*, 185 U.S. 343, 344 (1901); *St. Joseph & Grand Island Railroad v. Steele*, 167 U.S. 659, 662 (1897). "Our jurisdiction to review the judgment of the highest court of the State turns upon whether a federal right was specially set up or claimed in that court and denied by its decision. . . . And to be effective for this purpose the assertion of the Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support. . . ." *Parker v. McLain*, 237 U.S. at 471.⁶

Williams' argument that the Alabama Court of Civil Appeals' decision was based on an misinterpretation of the FELA is specious. A properly instructed jury made the determination as to the relative degrees of negligence and contributory negligence of the parties to this action.⁷ To suggest that the Alabama Court of Civil Appeals affirmed the judgment entered on that verdict because it made mistakes concerning the duty of an FELA defendant to exercise reasonable care to provide a reasonably safe place to work is

⁶ Under 28 U.S.C. § 1257, Williams can assert that this Court has jurisdiction only if he has a "title, right, privilege or immunity . . . specifically set up or claimed under the" Federal Employers' Liability Act. The other avenues of review outlined in § 1257 are inapplicable to this case. The railroad does not concede that Williams has properly set up such right or privilege under the FELA. Confusion arises because Williams originally argued that the verdict was inadequate. He presented the issue pressed in this Court for the first time in an application for rehearing before the Alabama Court of Civil Appeals.

⁷ No ground raised in Williams' post-trial motions or appellate briefs suggested that the jury was improperly instructed. Further, no objection was raised at trial as to the court's charge with respect to any issue raised in the Petition.

Williams' attempt to obtain certiorari when he is not entitled to it.

The issue before the Alabama Court of Civil Appeals and the Supreme Court of Alabama was whether Judge Hanes, the trial judge, abused his discretion in denying a new trial motion which challenged the adequacy of the damages awarded. The Alabama Court of Civil Appeals held that the denial of a new trial was not an abuse of discretion because the evidence at trial and the applicable law could explain a verdict of one dollar. The Alabama Court of Civil Appeals did not misconstrue the applicable law in affirming Judge Hanes' actions. The court simply held that the evidence at the trial of this civil action could have supported a finding of no negligence of the defendant and contributory negligence of the plaintiff. Because the FELA incorporates a pure comparative negligence standard, evidence which could support a finding of slight negligence of the defendant and substantial contributory negligence of the plaintiff mandates affirmance of the trial court.

The Supreme Court of Alabama originally agreed to hear the case and subsequently quashed the writ as improvidently granted. No majority opinion was submitted with the order. Three members of the Supreme Court of Alabama dissented from the decision to quash the writ and wrote a lengthy dissent. That dissent never addresses the Petitioner's contention, raised before that court as well as before this Court, that the Alabama Court of Civil Appeals misconstrued the FELA by imposing on the Petitioner the responsibility for providing himself a safe place to work.

The dissenting justices agreed with the majority that the contributory negligence issue was properly submitted to the jury, and the jury was properly instructed on the comparative negligence doctrine. Their disagreement arose as to the adequacy of the verdict. The dissenting justices thought the verdict was inconsistent with the preponderance of the evidence. Neither the majority, nor the dissenting members

of the court, even acknowledged the “burden shifting” argument of the Petitioner.⁸

The Alabama courts’ refusal to indulge in the analysis suggested by the Petitioner is significant. Although both the Alabama Court of Civil Appeals (on motion for rehearing) and the Supreme Court of Alabama were briefed on the issue, neither court understood the court of civil appeals’ decision as improperly burdening the Petitioner—the only issue which has been presented to this Court for review. The Alabama courts properly understood that the only issue of any merit which had been presented for their review concerned the adequacy of the damages awarded by the jury which heard the evidence in this case. The Petitioner apparently understands that there are no special and important reasons compelling this Court’s review of such a claim under Rule 10.1 of the Rules of the United States Supreme Court, effective on January 1, 1990.⁹ Rather than make such a claim, the Petitioner attempts to manufacture an issue by misconstruing the language in the Alabama Court of Appeals’ opinion. The effort utterly fails, and in so doing, precludes this Court from taking jurisdiction.

⁸ Because the “burden shifting” argument was developed by the Petitioner as a response to the Alabama Court of Civil Appeals decision affirming the denial of the new trial motion, the Petitioner has not, and cannot, comply with Rule 14.1(h) of the Rules of the Supreme Court of the United States, effective on January 1, 1990. Rule 14.1(h) requires the Petitioner to specify: (1) the stage in the proceedings, *both in the court of first instance and the appellate courts, at which the federal questions sought to be reviewed were raised . . .* (Emphasis added.)

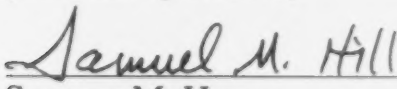
⁹ In *Southern Ry. v. Bennett*, 233 U.S. 80, 86 (1913) this Court ruled that a question concerning the amount of the verdict “. . . does not present a question for reexamination here upon a writ of error.” See also, *Louisville & Nash R.R. v. Halloway*, 246 U.S. 525, 529 (1917). Apparently, Williams has abandoned his challenge to the adequacy of verdict.

CONCLUSION

Williams has mischaracterized a state appellate court's language and has manufactured arguments in his Petition for a writ of certiorari in an effort to recover more than one dollar in damages. The jury reviewed the evidence and awarded what it thought just; the trial court ruled that the new trial motion based on inadequacy of damages was due to be denied; the Alabama Court of Civil Appeals affirmed that decision twice; and the Supreme Court of Alabama effectively affirmed as well. The Petitioner's blatant efforts to change the focus in this case are obvious. The burden of providing a safe workplace in an FELA case is not a complicated issue. It is the subject of pattern jury instructions which were given in this case. To suggest that the Alabama Court of Civil Appeals does not understand that burden and that its opinion is tainted by incorrect notions of burden allocation is the most spurious of arguments. The petition for a writ of certiorari raises no meritorious issue and should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for by placing same in the United States mail, properly addressed and postage prepaid, to Frank O. Burge, Jr., Burge & Wettermark, P.C., 2300 SouthTrust Tower, Birmingham, Alabama 35203.

This the 13th day of March, 1990.

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OF COUNSEL